Due service and receipt of a copy of the within is hereby admitted

this_____day of October, 1930.

_____

United States Attorney,

_____

Assistant United States Attorney,
Counsel for Appellee.

FILE COPY

Office Supreme
FILED
OCT 29
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 14.

WILLIAM A. SHERMAN, M. F. COCHRANE, AND J. B. SANFORD, CONSTITUTING THE BOARD OF STATE HARBOR COMMISSIONERS OF THE STATE OF CALIFORNIA, OPERATING THE STATE BELT RAILROAD,

vs.

THE UNITED STATES OF AMERICA.

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF APPELLANTS.

LEON E. MORRIS,
Counsel for Appellants.

EDWARD M. JAFFA,
KARL D. LOOS,
Of Counsel.

Washington, D. C.,
October 28, 1930.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

Page

I. Reply to Point I of Government's Brief
The operation of the State Belt Railroad by the Board of State Harbor Commissioners constitutes a Governmental function of the State of California and is not a private business 1

II. Reply to Point II of Government's Brief
The defendants in their individual capacity cannot be held to be a common carrier within the meaning of the Safety Appliance Act 3

III. Reply to Point III of Government's Brief
If this suit be regarded as one to enforce a penalty against the State of California, the District Court was without jurisdiction to entertain the case..... 5

TABLE OF CASES AND AUTHORITIES CITED.

Georgia v. Chattanooga,
264 U. S. 472 2

Irwin v. Wright,
258 U. S. 219 6

Murphy v. Utter,
186 U. S. 95 6

United States v. Nixon,
235 U. S. 231 3

Political Code of California,
Section 2524 2

Safety Appliance Act,
Section 6 (Ch. 87, 29 Stat. L. 85)..... 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 14.

WILLIAM A. SHERMAN, M. F. COCHRANE, AND J. B. SANFORD, CONSTITUTING THE BOARD OF STATE HARBOR COMMISSIONERS OF THE STATE OF CALIFORNIA, OPERATING THE STATE BELT RAILROAD,

vs.

THE UNITED STATES OF AMERICA.

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF APPELLANTS.

I.

The significance of the term "State Belt Railroad" should be understood and kept in mind. That

term does not designate an artificial person or an entity of any kind. It is a name that has been applied by custom to the tracks along the San Francisco waterfront. These tracks were laid under the authority of the following paragraph of Section 2524 of the Political Code of California:

> "Said board may, when the wants of commerce require, lay down such number of tracks along and on any portion of said waterfront as may be necessary to meet such wants, and permit the use thereof to any corporation or association, or any person or persons, under such rules, regulations, and at such compensation as said Board may determine; * * *"

The State Belt Railroad is thus merely certain property used by the Board of State Harbor Commissioners in the performance of its function of providing and maintaining San Francisco harbor. That function is a governmental function and not a private business. To whatever extent the Board may perform a carrier service in the operation of the State Belt Railroad, such carrier service is a mere incident to the governmental function of providing and maintaining a harbor and the performance of such an incidental carrier service does not render the State Board of Harbor Commissioners or the members thereof or the State of California, a common carrier.

If we are correct in this view, the argument in the Government's brief that a State engaged in the operation of a railroad as in *Georgia v. Chattanooga*, 264 U. S. 472, is engaged in a private business, has no application to this case.

On the other hand, if the operation of the State

Belt Railroad is to be segregated from the governmental function of the State Board of Harbor Commissioners and to be treated as the State engaged in a private business and if such private business be held to be that of a common carrier, it becomes important to determine with precision who is the common carrier. We submit that if the State Belt Railroad is a common carrier, then it is the Board of State Harbor Commissioners in their official capacity or the State of California that is such carrier.

II.

The brief of the United States (pp. 21-30), argues that the suit is against the defendants Sherman, Cochrane and Sanford, individually and in their private capacity and contends that they are the common carrier just as a receiver of a railroad is a common carrier, citing *United States v. Nixon*, 235 U. S. 231.

However, a receiver can be a common carrier only in his capacity as a receiver.

Moreover, a receiver is not personally liable for acts done by him in his capacity as a receiver; and his personal property cannot be subjected to the debts and liabilities of the company or property for which he is receiver. The United States contends (brief, p. 25) that the judgment here involved was against the appellants individually and that in the enforcement of the judgment no relief against the State will be necessary, clearly intimating that the private property of the individual members of the Board of Harbor Commissioners named as defendants will be subjected to levy for the payment of the judgment in question.

Even if the Board of Harbor Commissioners, as an

entity, should be considered to be a common carrier in its function of operating the State Belt Railroad, that would not warrant a judgment against the individual members of the Board in their private capacity. The Board of State Harbor Commissioners in operating the State Belt Railroad are acting in their official capacity. The statute imposes the penalty only upon the carrier and not upon the officers, agents or employees of the carrier.

The present judgment cannot be sustained unless it be held that Messrs. Sherman, Cochrane and Sanford, in their individual and private capacity, constituted a common carrier. Such a holding is hardly possible, because these individuals in their private capacity did not have any possession, control or any authority whatsoever with respect to the rails or equipment of the State Belt Railroad.

The theory of the contention of the United States that defendants constituted a common carrier in their individual capacity is based upon a misconception of law and fact. The Harbor Commissioners are authorized by State statute to operate the State Belt Railroad and in so doing they are acting in their official capacity pursuant to law. The mere fact that in the course of such operation unlawful acts occur without their personal participation and contrary to their orders and instructions cannot change their maintenance and operation of the State Belt Railroad from a lawful to an unlawful one; cannot change the capacity in which the operation is conducted from an official to a private one. The arguments and authorities in the Government's brief relating to the personal wrongdoing of a State officer are not in point because it affirmatively appears from the record herein that defendants not only did not personally par-

ticipate in the offenses and had no knowledge of them but that they occurred contrary to their orders and instructions. There would, therefore, be no basis for holding defendants liable even if the statute did impose a penalty upon an officer or agent guilty of a violation. But the statute contains no such provision.

The absolute liability imposed by the Safety Appliance Act (Ch. 87, 29 Stat. L. 85) (brief of the United States, pp. 26-27), is imposed only upon the carrier; no penalty whatever is imposed upon officers or agents of the carrier. Referring to the argument of the Government commencing on the bottom of page 28 of its brief, it should be borne in mind that there is no question involved of an affirmative failure of the State of California or its officers to comply with any law or safety regulation. The defective cars were furnished to the State of California for switching by railroad companies engaged in interstate commerce. Complete enforcement of the Federal Safety Appliance Act can be had and the safety of employees assured by proceeding against the said railroad companies.

III.

The brief for the United States argues that the rule that a sovereign is not bound by words of a general statute unless named therein, is limited to the enacting sovereign. While the cases in which the rule has been applied have been cases involving the enacting sovereign, we urge that the rule should be applied in like manner to equal and coordinate sovereigns as the State and National governments. We have found no authority denying the application of

the rule to such dual sovereignties and none is cited in the Government's brief.

The Government also contends that the provision of the Judicial Code giving this Court exclusive jurisdiction of all controversies of a civil nature where a State is a party (with exceptions not here pertinent) was modified and amended by Section 6 of the Safety Appliance Act authorizing suit for recovery of penalties to be brought in the District Court. We think the general language of Section 6 of the Safety Appliance Act is not sufficient to repeal the specific declaration of policy that the Supreme Court shall have exclusive original jurisdiction of suits involving a State.

We believe the inference to be drawn from the absence of any provision giving jurisdiction to enforce the penalty against a State is that Congress did not intend such penalties to be applicable against a State.

The United States apparently has treated this action as one against defendants individually. The defendants named in the suit ceased to be officials of the State or members of the Board of Harbor Commissioners before trial and before judgment was entered. (Tr. 40.) If the suit was originally intended as one against the Board of Harbor Commissioners, in their official capacity, the proper procedure would have been to substitute the successors in office for the defendants originally named. *Murphy v. Utter,* 186 U. S. 95; *Irwin v. Wright,* 258 U. S. 219.

Treated as a suit against the individual members of the Board, in their private capacity, the defendants are not a common carrier, and the judgment cannot be sustained because the statute imposes the penalty only upon the carrier and not upon its officers or agents.

The other points raised by the Government are fully answered in our original brief.

It is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

LEON E. MORRIS,
Counsel for Appellants.

EDWARD M. JAFFA,
KARL D. LOOS,
Of Counsel.

Washington, D. C.,
October 28, 1930.